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No. 754

In the Supreme Court of the United States

OCTOBER TERM, 1958

THE TAFT HOTEL CORPORATION, PETITIONER

v.

HOUSING AND HOME FINANCE AGENCY, ALBERT W. COLE, Administrator of the Housing and Home Finance Agency, FRANK O'BRION, HARRY BARNET, ANDREW EUSTON, FRED W. WATERMAN, JR., MATTHEW RICOPPOLO, Constituting the New Haven Redevelopment Agency and the CITY OF NEW HAVEN

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENTS HOUSING AND HOME FINANCE AGENCY AND ALBERT W. COLE IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court for the District of Connecticut (R. 21a-22a) is reported at 162 F. Supp. 538. The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a-3a) is reported at 262 F. 2d 307.

JURISDICTION

The judgment of the Court of Appeals was entered on December 31, 1958 (R. 36a). The petition for a writ of certiorari was filed on March 6, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether service of process in Washington on the Administrator for the Housing and Home Finance Agency gave the District Court in Connecticut jurisdiction over him.

2. Whether the Housing and Home Finance Agency, as distinct from the Administrator of the Agency, may sue and be sued.

3. Whether petitioner, whose sole alleged injury is a potential loss of profits from economic competition, has standing to maintain an action to test the legality, and enjoin the payment, of a federal loan and grant to a local slum clearance authority.

STATUTE AND RULE INVOLVED

42 U.S.C. 1456(c)(1) provides in part as follows:

> (c) * * *
>
> In the performance of, and with respect to, the functions, powers, and duties vested in him by this subchapter, the Administrator, notwithstanding the provisions of any other law, may—
>
> 1. sue and be sued;
>
> * * * * *

Rule 4(f), Federal Rules of Civil Procedure, provides in pertinent part:

(f) Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. * * *

STATEMENT

This action was brought by the petitioner, a Connecticut corporation which owns and operates the Taft Hotel in New Haven, Connecticut (R. 3a). The complaint alleged that the Housing and Home Finance Agency (HHFA) had approved a plan for federally-assisted slum clearance and urban redevelopment in New Haven and that the plan provided for the resale of a portion of the project land to a private hotel developer (R. 4a). The petitioner complained that the construction of the new hotel would cause it "severe financial loss" (R. 8a) and, accordingly, prayed that the Administrator be enjoined "from furnishing any financial assistance" to the New Haven redevelopment authorities (R. 10a).

Copies of the summons and complaint were served upon Albert W. Cole, Administrator of the Housing and Home Finance Agency, in the District of Columbia (R. 21a). Mr. Cole thereupon moved to dismiss the action as to him, or to quash the return of service, on the grounds that he had not been properly served (R. 27a). Respondent Housing and Home Finance Agency also moved to dismiss the complaint, on the grounds that it failed to state a claim upon which relief could be granted, that there was no justiciable controversy, and that the District Court lacked jurisdiction over the Agency (R. 26a).

The District Court dismissed the action for lack of jurisdiction (R. 21a-23a). It held, first of all, that the court lacked jurisdiction over Mr. Cole because he had not been served with process within "the state in which the district court is held. Rule 4(f), Federal Rules of Civil Procedure." (R. 21a.) It held, further, that the court also lacked jurisdiction over the HHFA because Congress has not authorized the agency "as distinct from the administrator, to sue or be sued." (R. 22a.) As an additional ground for dismissal, the court held that the petitioner lacked standing to maintain the action either as a taxpayer or as a person who may sustain economic loss through competition (R. 22a). The Court of Appeals, *per curiam*, affirmed (Pet. App. 1a-3a).

ARGUMENT

The court below held that the District Court lacked jurisdiction over the federal defendants and, in addition, that the petitioner lacked standing to maintain this action. That decision is clearly correct, and further review by this Court is not warranted.

1. Congress has provided that the Administrator of the agency, as distinguished from the agency itself, may sue and be sued in connection with the performance of his agency duties, 42 U.S.C. 1456 (c) (1) (*supra*, p. 2). Accordingly, an action properly brought may be maintained against the Administrator. But the present action was not properly brought, for the Administrator was not served with process within the State of Connecticut and, conse-

quently, the District Court for the District of Connecticut had no jurisdiction over him.

Rule 4(f) of the Federal Rules of Civil Procedure provides that process, to be effective, must be served within the borders of the state in which the District Court is held except where a federal statute provides otherwise. And as the District Court below correctly observed, there is no federal statute authorizing the service of process upon the Administrator outside that territorial limit (R. 21a-22a). The petitioner suggests that the "sue and be sued" clause creates a statutory exception to the general rule, and contends that the decision by the court below conflicts with the holding of the Fourth Circuit Court of Appeals in *Seven Oaks* v. *Federal Housing Administration*, 171 F. 2d 947 (Pet. 5-7). Examination of the *Seven Oaks* decision shows the petitioner's reliance, in this respect, to be misplaced. There, the major premise was "* * * that the court in which suit is brought be able to acquire jurisdiction over the defendant by service of its process * * *" (p. 949). But where, as here, the District Court's process was not effectively served upon the respondent, the court cannot have acquired jurisdiction over him.

2. With respect to the dismissal of the action against the Housing and Home Finance Agency, the courts below were also correct. The Housing and Home Finance Agency, which was established by Reorganization Plan No. 3 of 1947, 12 F. R. 4981, 61 Stat. 954, 5 U.S.C. 133y, is an unincorporated agency of the United States. Congress has not empowered

it to sue, or permitted it to be sued. Cf. *Blackmar* v. *Guerre*, 342 U.S. 512, 515. To be sure, the opinions below appear inconsistent on this point with that of the Fourth Circuit in *Seven Oaks* v. *Federal Housing Administration*, 171 F. 2d 947, where, dealing with a different statute, that court held that statutory permission for suit against the Federal Housing Administrator constituted authority for suit against the Federal Housing Administration. Since the Fourth Circuit did not discuss the basis for its holding it is not possible to know whether it was based on the structure or legislative history of the particular act or whether it enunciated some general rule. In any event the only service which was effected in the present case was on the Administrator in Washington,[1] so that clearly there was no jurisdiction over the Agency in Connecticut.

3. The only injury which petitioner alleges is that it will suffer "economic destruction by reason of the establishment of an excess of hotel, banquet and restaurant facilities * * *" in the New Haven area (Pet. 10). But, as the court below held, consonant with numerous decisions by this Court, and by the courts of appeals, such economic loss does not constitute legal injury. *Tennessee Electric Power Co.* v. *T.V.A.*, 306 U.S. 118; *Duke Power Co.* v. *Greenwood County*,

[1] In his petition, petitioner refers to the fact that process was served on the United States Attorney in Connecticut. There is nothing in the provisions establishing the Housing and Home Finance Agency or in the statutes generally which would transform service on the United States Attorney into service on the agency here involved.

302 U.S. 485; *Alabama Power Co.* v. *Ickes*, 302 U.S. 464; *Benson* v. *Schofield*, 236 F. 2d 719, 722 (C.A. D.C.), certiorari denied, 352 U.S. 976; *Allied-City Wide* v. *Cole*, 230 F. 2d 827 (C.A. D.C.); *Kansas City Power and Light Co.* v. *McKay*, 225 F. 2d 924 (C.A. D.C.), certiorari denied, 350 U.S. 884. Cf. *Allen* v. *Grand Cent. Aircraft Co.*, 347 U.S. 535, 539-541.

The petitioner attempts to distinguish the Power Company cases on the ground that the proposed use of federal funds had been authorized by Congress, whereas the present loans and grants for urban redevelopment and slum clearance are not (Pet. 12-13). Obviously, though, whether the action taken by the federal officials was proper or not is altogether irrelevant to the threshhold issue of standing to challenge the action. This is strikingly apparent from this Court's statement of the issue in *Alabama Power Co.* v. *Ickes*, *supra*: whether "anyone who will suffer injurious consequences from the lawful use of money about to be unlawfully loaned [may] maintain a suit to enjoin the loan" (p. 480). The holding of that case, *i.e.* that the local power company had not been legally wronged regardless of the legality of the federal loan, wholly disposes of the petitioner's untenable distinction.

Similarly untenable is the petitioner's reliance upon decisions construing regulatory statutes which, by their terms, broaden the group of persons who may appeal administrative decisions.[2] And the petition-

[2] The plaintiffs in *F.C.C.* v. *National Broadcasting Co.*, 319 U.S. 239, *Scripps-Howard Radio* v. *Comm'n*, 316 U.S. 4, and *F.C.C.* v. *Sanders Bros. Radio Station*, 309 U.S. 470,

er's suggestion that Section 10(a) of the Administrative Procedure Act, 5 U.S.C. 1009, enlarges the class of persons who have standing to challenge administrative actions is refuted by the terms of that section which merely declare pre-existing case law concerning standing to sue. *Atchison, Topeka and Santa Fe Ry. Co.* v. *United States*, 350 U.S. 892, affirming 130 F. Supp. 76; *Kansas City Power and Light Co.* v. *McKay*, 225 F. 2d 924, 932 (C.A. D.C.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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acquired standing by the terms of Section 402(b) of the Federal Communications Act, 47 U.S.C. 402(b). In *Associated Industries* v. *Ickes*, 134 F. 2d 694 (C.A. 2), reversed on other grounds, 320 U.S. 707, standing was based upon Section 6(b) of the Bituminous Coal Act of 1937, 15 U.S.C. 836(b), expired August 21, 1943, 57 Stat. 81.

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